IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-[redacted]-00216

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JD GULLY APPELLAN

VS.

STATE OF MISSISSIPPI APELLEI

APPEAL FROM THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

CHARLES W. WRIGHT, JR.
CHARLES W. WRIGHT, JR., PLLC
POST OFFICE BOX 1677
1208 22ND AVENUE
MERIDIAN, MS 39302-1677
(601) 693-6555
MSB No. [redacted]

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-TS-00216

JD GULLY **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

WITNESSES AT THE TRIAL LEVEL

1. Daniel Boyd, Meridian, Mississippi.
2. William Parker, Meridian, Mississippi.
3. Keith McMahan, Meridian, Mississippi.
4. J.D. Gully, Meridian, Mississippi.

COUNSEL FOR DEFENDANT

1. Honorable Charles W. Wright, Jr., Meridian, Mississippi.

DEFENDANT

1. J.D. Gully, Meridian, Mississippi.

TRIAL COUNSEL FOR THE STATE

1. Honorable E.J. "Bilbo" Mitchell, District Attorney for the 10th Circuit District of the State of Mississippi, Meridian, Mississippi.
2. Honorable James D. "Dan" Angero, Assistant District Attorney for the 10th Circuit District of the State of Mississippi, Meridian, Mississippi.

3. Honorable Craig A. Conway, Assistant District Attorney for the 10th Circuit District of the State of Mississippi, Meridian, Mississippi.

TRIAL JUDGE

1. Honorable Lester F. Williamson, Jr., Circuit Judge for the 10th Circuit District of the State of Mississippi, Meridian, Mississippi.

COUNSEL FOR APPELLEE

1. Honorable James M. "Jim" Hood, III, Attorney General for the State of Mississippi.

Respectfully submitted this the 16th day of May, 2008.

J.D. GULLY, APPELLANT

BY: Charles W. Wright
CHARLES W. WRIGHT, JR.,
ATTORNEY FOR APPELLANT

REQUEST FOR ORAL ARGUMENT

Comes now, the Appellant, J.D. Gully, and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal.

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STATEMENT OF THE ISSUES

I. Whether the trial court erred by denying the Defendant's First Motion for a Mistrial after the Prosecution violated the trial court's ruling on the Defendant's Motion in Limine.

II. Whether the trial court erred by ruling that the Defendant could not submit evidence in support of his theory of defense.

III. Whether the weight and sufficiency of the evidence presented at trial justified the guilty verdict.

IV. Whether the cumulative effect of the errors made by the trial court requires that a new trial be ordered.

STATEMENT OF THE CASE

I. Nature of the Case

On the 27th and 28th days of November, 2007, the Appellant [hereinafter Defendant], J.D. Gully, was tried and convicted in the Circuit Court of Lauderdale County, Mississippi, on an indictment which charged him with the sale of hydrocodone and acetaminophen [hereinafter hydrocodone] within 1500 feet of a church, in violation of Miss. Code Ann. §§ 41-29-139 and 41-29-142. (R.E. 2, 7; R. 1/2-3, 79, 84-85).

II. Course of the Proceedings

On or about March 23, 2007, an indictment was returned by a Lauderdale County Grand Jury, charging the Defendant with the sale of hydrocodone within 1500 feet of a church, in violation of Miss. Code Ann. §§ 41-29-139 and 41-29-142. (R.E. 7; R. 1/2-3). Following the indictment, on April 10, 2007, a capias was issued and the Defendant was arrested. (R. 1/4). Also on April 10, 2007, the Defendant waived arraignment and entered a plea of not guilty to the charge in the indictment, and the case was set for trial. (R. 1/5).

On November 19, 2007, the Prosecution filed its first Motion to Amend the indictment, and then, filed its second Motion to Amend the indictment on the day the trial began. (R.E. 12; R. 1/48-49, 80-81). Both of these motions were granted, over objections by the Defendant's attorney, on the day the trial began. (R.E. 5,14; R. 1/50-51, 2/6-8).

On November 27, 2007, prior to the start of the trial, the Defendant, through his Attorney, made an *ore tenus* Motion in Limine to prohibit the Prosecution from eliciting information regarding or bringing up any allegations from a separate charge against the Defendant, and this motion was granted by the trial court. (R.E. 14; R. 2/12-13).

On November 27, 2007, the trial began and the Prosecution called Agent Daniel Boyd [hereinafter Boyd] of the East Mississippi Drug Task Force [hereinafter EMDTF] to testify. (R.

2/79). During the Prosecution's direct examination of Boyd, he responded to a question by the Prosecution's attorney which elicited a response in violation of the trial court's ruling on the Defendant's Motion in Limine. (R.E. 15; R. 2/97). After this response, the Defendant's attorney made a timely objection and the jury was excused from the courtroom. (R.E. 15; R. 2/97-98).

The Defendant then moved for a mistrial based on the Prosecution's violation of the trial court's prior ruling that the Prosecution could not solicit information regarding a separate charge against the Defendant. (R.E. 15; R. 2/99-100). The trial court denied the Motion for a Mistrial, and instead gave a curative instruction to the jury. (R.E. 15; R. 2/102-105).

After the Prosecution rested its case in chief, it requested that the Defendant not be allowed to present certain witnesses because in the Reciprocal Discovery—provided by the Defendant's attorney more than three (3) months before the Defendant was informed which charge would be tried—the Defendant stated that these witnesses would testify regarding the possession case which the Defendant thought would be tried on November 27, 2007. (R.E. 8, 16; R. 1/23-24, 3/198-200; Trial Ex. 13). The trial court refused to allow the Defendant to call his wife and other witnesses to the stand to testify in support of his theory of defense. (R.E. 16; R. 3/202-207).

The Defendant's attorney then made a Motion for a Directed Verdict in favor of a judgment of acquittal on behalf of the Defendant because the Prosecution failed to prove the elements of the crime charged, and this motion was denied by the trial court. (R.E. 17; R. 3/207-209).

After the Defendant's testimony was complete, the Defendant's attorney proffered the contents of the testimony of the witnesses who were not allowed to testify for purposes of the record. (R.E. 17; R. 3/255-257). The Defendant's attorney also made a Motion for a Mistrial on

behalf of the Defendant due to the fact that the Defendant was not allowed to present his theory of defense without one of these witnesses, and this motion was denied. *Id.*

The jury returned its verdict on November 28, 2007, finding the Defendant guilty of the sale of hydrocodone within 1500 feet of a church. (R.E. 2; R. 1/79, 84-85, 4/305-306; Trial Ex. 16).

Following the trial, on December 7, 2007, the Defendant filed a Motion for J.N.O.V., or in the Alternative, Motion for a New Trial. (R.E. 6; R. 1/86-88).

On January 8, 2008, the Sentencing Hearing was conducted, the Defendant was sentenced, and final judgment was rendered. (R.E. 3; R. 1/89-91, 4/309, 332-335). The Defendant's Motion for J.N.O.V., or in the alternative, Motion for a New Trial was also denied on January 8, 2008. (R.E. 6; R. 1/96, 4/335-336).

On February 1, 2008, the Defendant timely filed his Notice of Appeal, in order to appeal this case to the Supreme Court of the State of Mississippi. (R. 1/104-105).

III. Disposition in the Court Below

On November 28, 2007, the Defendant's trial ended and the jury found him guilty of selling hydrocodone within 1500 feet of a church. (R.E. 2; R. 1/79, 84-85, 4/306).

The trial court sentenced the Defendant on January 8, 2008 to: "serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections with twelve (12) years suspended and five (5) years supervised probation . . . after he[] has completed service of eight (8) years in the custody of the Department of Corrections . . . [p]ay Court costs of $295.50, AB fee of $400.00, $300.00 lab fee, $200.00 restitution to the Task Force, fine of $5,000.00 for a total of $6,195.50 to be paid at a rate to be determined upon release . . ." and other terms of his probation following his time in the custody of the Department of Corrections. (R.E. 3; R. 1/89-91, 4/332-335).

On February 1, 2008, the Defendant timely filed his Notice of Appeal, in order to appeal the final judgment, the denial of the Defendant's Motion for J.N.O.V., and the denial of the Defendant's Motion for a New Trial. (R. 1/104-105).

IV. Statement of Facts

The Defendant, J.D. Gully, is a sixty (60) year old resident of Lauderdale County, Mississippi, who was employed by the Meridian Star newspaper as a newspaper delivery person. (R. 3/218, 221-222). The Defendant only has a sixth grade education, and is a simple man who sometimes has a hard time communicating, as was demonstrated during his testimony. (R. 3/218). The Defendant also has no prior felony convictions. (R.E. 13; R. 3/218; Sentencing Hearing Ex. 1).

The Defendant is married and has three (3) children. (R. 3/222). At the time of the trial, the Defendant had been fired from his job because of the charge and time in jail, and was trying to get disability because of problems he has with his heart and his hip. (R. 3/222-224). At the time of the alleged offense, the Defendant was taking Lortab (hydrocodone), which was prescribed to him by a doctor for his hip, on which he had recently had surgery. (R. 3/225-226; Trial Ex. 14).

The Prosecution alleged in its Indictment against the Defendant—after it was amended by motion on the day of the trial over the Defendant's objection—that on September 27, 2006, the Defendant sold hydrocodone to a confidential informant of the EMDTF [hereinafter informant] within 1500 feet of a church in a video-recorded "buy/walk" operation, where the informant makes the buy and the violator walks away, in order to protect the informant's identity. (R.E. 7; R. 1/2-3, 2/76, 80-81, 97).

The informant who organized the alleged sale, Bill Parker [hereinafter Informant Parker], had been arrested several days prior to the alleged sale for trying to obtain a prescription by

fraud. (R. 2/123, 3/158, 175-176). Instead of informing the District Attorney's office of the arrest to allow the District Attorney to pursue an indictment against Parker, EMDTF entered into an agreement with Informant Parker, where he would act as a confidential informant and "inform on people" in order to "work off" the charge. (R. 2/123-125, 3/177-178, 183). Informant Parker had been a friend of the Defendant, and had visited the Defendant's house on many occasions prior to the alleged sale. (R. 3/170-171, 227).

The Prosecution alleges that Informant Parker called the Defendant's phone to set up the alleged transaction. (R. 2/75-76). However, the EMDTF Agents organizing the operation did not verify what number Informant Parker dialed and did not verify that it was actually the Defendant who was called. (R. 2/120-121). In fact, it was not until the trial when the Prosecution asked Informant Parker the number he dialed and then asked the Defendant his telephone number, that an attempt was made to establish that Informant Parker actually called the Defendant's telephone number. (R. 3/161, 237, 288). Also, Boyd testified that the phone call, allegedly made to the Defendant, was made from Informant Parker's house; however, Informant Parker testified that the call was made from the EMDTF office and that they then went to his house to complete the transaction. (R. 2/86, 3/161).

After the purported phone call, the Defendant is alleged to have arrived at the home of Informant Parker. (R. 2/75-76). However, neither Boyd, who was the Agent at Informant Parker's house, nor the other Agents who were watching from a vehicle on the street, made any attempt to see or record the tag number of the car in which the Defendant is alleged to have arrived, even though Boyd testified that the Defendant arrived in a Red Ford Focus. (R. 2/93-94, 135, 3/288).

Boyd also testified that he was looking through blinds while he watched the alleged transaction within an arm's length of the video camera; however, when the tape from the video

camera right next to Boyd is reviewed, it is clear that there were no blinds on the window. (R. 2/90-91, 3/289; Trial Ex. 3, 4).

It is then alleged that the Defendant sold forty (40) pills of hydrocodone to Informant Parker for two hundred dollars ($200.00). (R. 2/76). In his testimony, Informant Parker stated that the pills were wrapped in a paper towel when he received them and transferred them to Boyd. (R. 3/166, 172-173; Trial Ex. 12). However, the pills allegedly sold by the Defendant were in a white "Mr. Discount" drugstore bag when introduced as evidence during the trial, and Boyd stated in his testimony that he had only counted the pills and placed the evidence in a heat-sealed "K-pak" bag. (R.E. 9; R. 2/106-107, 109, 3/195, 287-289; Trial Ex. 2). Also, Boyd was confused as to the number of pills that were involved in the alleged transaction, stating at one point that there were 200 pills, and then the Prosecuting attorney led him to say it was only 40 pills. (R. 2/111).

The Defendant produced medical records to show that he was prescribed hydrocodone, but on the name on the bag put into evidence at trial was "Gordon Gloria," and the Prosecution made no attempt to connect that name to the Defendant. (R.E. 9; Trial Ex. 2, 14). Further, the fact that another person's name was on the bag was exculpatory evidence that was not disclosed to the Defendant. (R.E. 9; Trial Ex. 2, 6).

Also, even though Boyd testified that it would have been possible, no fingerprint analysis was done on the bag alleged to have been involved in the purported transaction. (R. 2/136, 3/289). Further, Boyd testified that the informant was given "official buy funds" of the EMDTF to make the alleged purchase, and copies of the one hundred dollar bill and of five (5) twenty dollar bills were in the discovery. (R. 2/93; Trial Ex. 6). However, these bills were not recovered from the Defendant to tie him to the alleged sale.

Informant Parker testified that the Defendant came to the house and immediately made the transaction, even after the Prosecution attempted to lead him to respond differently. (R. 3/165, 184, 287). However, Boyd testified that the Defendant left Informant Parker's house, returned to his car to retrieve the pills, and returned to Informant Parker's house. (R. 2/95-96).

Informant Parker also testified that the Agents had searched his house that day, even though Boyd had testified that it was several days before the alleged transaction. (R. 2/132-133, 3/162-163, 184). Informant Parker did not change this testimony until he was led to do so in re-direct examination by the Prosecution—at which point he stated that the search occurred several days prior to the alleged transaction. (R. 3/186-187).

In order to enhance the penalty for the alleged offense, the Prosecution was allowed to introduce a printout from "Google Earth," over an objection by the Defendant's attorney, which shows that the distance between where the alleged transaction occurred and the closest church as less than 1,500 feet. (R.E. 10; R. 2/117-119, Trial Ex. 5). However, Boyd conceded that this distance is measured in a straight line and does not account for whether it is through woods or on a road. (R. 2/142).

Informant Parker was a friend of the Defendant, so the fact that Informant Parker picked out the man from whom he said he bought hydrocodone in a photo lineup did nothing to aid the Prosecution's case, and further, the photo lineup was not included in the case report. (R.E. 12; R. 2/126, 3/170-171, 174, 219, 227; Trial Ex. 6-9).

Also, Boyd testified that he also went through a photo lineup to identify the Defendant, but that identification was also left out of the case report. (R.E. 12; R. 2/126, 3/291; Trial Ex. 6-9). Further, Boyd was E-mailed the photo lineup and a copy of the Defendant's driver's license at the same time; and Boyd testified that when he made his own photo identification of the Defendant, he did so while or after viewing a copy of the Defendant's driver's license. (R.

2/130-131, 3/289). Boyd also made an in-court identification of the Defendant, but that was not a difficult task since the Defendant is sitting at the defense table. (R. 2/116.)

The Defendant also played the video of the alleged transaction taped by Boyd, which did not include any audio. (R. 3/232-234, 291; Trial Ex. 3, 4). In the video, the identity of the person making the alleged transaction is not clear, and the person in the video looks younger and in better health than the Defendant. (R. 3/237, 244, 253, 291).

The Defendant stated in his testimony that he was not the person in the video, and that he did not sell hydrocodone to Informant Parker. (R. 3/235).

SUMMARY OF THE ARGUMENT

I. The trial court erred by denying the Defendant's First Motion for a Mistrial after the Prosecution violated the trial court's ruling on the Defendant's Motion in Limine.

II. The trial court erred by ruling that the Defendant could not submit evidence in support of his theory of defense.

III. The weight and sufficiency of the evidence presented at trial did not justify the guilty verdict.

IV. The cumulative effect of the errors made by the trial court requires that a new trial be ordered.

The trial court clearly abused its discretion by denying the Defendant's Motion for a Mistrial after the Prosecution's violation of the trial court's ruling on the Defendant's Motion in Limine. By allowing the trial to continue after the Prosecution's witness stated that the informant had made another case against the Defendant and that the other case had a technical difficulty, the trial court allowed the jury to continue hearing the case after the "substantial and irreparable prejudice" to the Defendant's case. Further, the trial court's curative instruction did nothing more than highlight the error that had already occurred and prejudiced the case. The prejudice against the Defendant because of these remarks is heightened due to the fact that the Defendant had no prior felony convictions. Thus, the trial court's denial of the Motion for a Mistrial caused a "miscarriage of justice," and therefore, a mistrial should have been granted.

The Defendant's second Motion for Mistrial was also denied. This motion was the result of the trial court's decision not to allow the Defendant to call his wife to the stand in support of his theory of defense. The trial court held that this would be cumulative, and only allowed the Defendant to call himself as a witness. The fact that the trial court refused to allow the

Defendant to call a witness in support of his theory of defense is clearly an abuse of discretion by the trial court, and should have resulted in the granting of the Defendant's Motion for a Mistrial.

Further, the sufficiency and weight of the evidence in this case were inadequate to support the conviction of the Defendant. There were contradictions in the testimony of the two alleged eyewitnesses regarding the chain of custody of the evidence, the alleged occurrences, and there were also issues which made the identifications inadequate. The Prosecution also violated its Discovery requirements by failing to inform the Defendant of the exculpatory evidence that it possessed. Further, the alleged eyewitnesses were the informant who was not at all credible, and the agent who could not see the alleged transaction. The fact that the Prosecution presented no other corroborating evidence leads to the conclusion that the evidence was insufficient and not of enough weight to justify a guilty verdict.

Also, the fact that the Defendant was convicted by the jury is more likely the result of the prejudice he suffered because of the trial court's failure to grant a mistrial either when the Prosecution violated the trial court's ruling on the Motion in Limine, or when the Defendant was not allowed to call any witnesses other than himself in support of his theory of defense. Thus, the trial court erred by not granting the Defendant's Motion for a Directed Verdict and Motion for J.N.O.V., and abused its discretion by not granting a peremptory instruction for the Defendant and by failing to grant the Defendant's Motion for a New Trial.

If the aforementioned errors individually are not enough to at least warrant a new trial, then the cumulative effect of these and other errors in the proceedings leads to the conclusion that a new trial is required in the interest of justice, and that the trial court abused its discretion by failing to grant a new trial.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S FIRST MOTION FOR A MISTRIAL AFTER THE PROSECUTION VIOLATED OF THE TRIAL COURTS RULING ON THE DEFENDANT'S MOTION IN LIMINE.

Prior to the start of the trial in this case, the Defendant, through his Attorney, made a Motion in Limine to prevent the Prosecution from bringing up or asking a question that would elicit a response that referred to other charges against the Defendant. (R.E. 14; R. 2/12). This motion was granted by the trial court, and the Prosecution's attorney stated: "I covenant with the Court that I won't [sic.] get into that unless I bring it to the Court's attention outside the presence of the jury before I do so." (R.E. 14; R. 2/13).

During the direct examination of the Prosecution's first witness, the Prosecution asked the witness whether the informant used in this case has been used to make any other cases. (R.E. 15; R. 2/97). The witness then replied: "[y]es, sir. He did make cases on [the Defendant] once more, but we had a technical difficulty on that case." *Id.* The Defense made a timely objection, and the jury was excused from the courtroom. (R.E. 15; R. 2/97-98).

The Defendant, through his attorney, made a Motion for a Mistrial based on the Prosecution's violation of the trial court's ruling on the Motion in Limine, stating:

> Comes now the Defendant by and through his attorney of record and moves for a mistrial consistent with the Court's prior ruling that the prosecution would not solicit any other claims of charges of Mr. Gully. The witness now has testified in front of the jury that there was another buy case promulgated by the undercover agent and could not pursue it due to technical nature. It is highly prejudicial to the Defendant. It is in complete abrogation of the Court's prior ruling, and it cannot be tolerated; and no—no type of curative instruction can be given to cure this type of testimony. . . . The cat is out of the bag. It's before the jury. If the Court attempts some type of curative instruction, it just highlights it worse. The prejudicial effect at this point cannot be overcome other than [by] a mistrial.

(R.E. 15; R. 2/99-100, 102).

The trial court denied this Motion for a Mistrial, and instead gave a curative instruction to the jury. (R.E. 15; R. 2/102-104).

Regarding the standard of review for the denial of a motion for a mistrial, this Court has stated that it "reviews motions for mistrial under an abuse of discretion standard. The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Tate v. State*, 912 So.2d 919, 932 (¶ 41) (Miss. 2005) (citing *Gossett v. State*, 660 So.2d 1285, 1290-91 (Miss. 1995)). "A violation of a motion in limine should not result in the costly and time-consuming penalty of a new trial unless it affirmatively appears from the whole record that a miscarriage of justice has resulted." *Mills v. State*, 763 So.2d 924, 929 (¶ 17) (Miss. Ct. App. 2000) (citing *Henderson v. State*, 403 So.2d 139, 140 (Miss. 1981)).

The statement by the Prosecution's witness clearly constituted an "error in the proceedings" because, the Prosecution's eliciting the response from the witness violated the trial court's ruling on the Motion in Limine, as was held by the trial court. Further, this error resulted in "substantial and irreparable prejudice" to the Defendant in this case, because the Defendant had no prior felony convictions on his record. (R.E. 13; Sentencing Hearing Exhibit 1).

Regarding situations where a trial court's ruling on a Motion in Limine is violated by an attorney for the Prosecution, this Court has stated:

> In most cases, when an objection is made to improper questions by a district attorney and the court sustains the motion and admonishes the jury to disregard the improper questions and evidence, we have held that any prejudice created by the questions was cured and the trial court properly overruled the motion for a mistrial. *Reid v. State*, 266 So.2d 21 (Miss. 1972); *Thomas v. State*, 285 So.2d 148 (Miss. 1973). However, in the final analysis, each case must be decided on its own peculiar facts.

Henderson, 403 So.2d at 140.

In *Henderson*, this Court held "that the prejudicial effect upon the jury was so great that the court's learned and lengthy admonition to the jury to disregard the improper evidence was in vain." *Id.* at 141. This holding was due to the fact that the Prosecution in *Henderson* violated

the trial court's ruling on a Motion in Limine to prevent questions regarding the conviction of a co-indictee. *Id.*

Also, in *Hughes v. State*, the Prosecution made reference to and solicited information regarding other charges against the defendant. 470 So.2d 1046, 1047-48 (Miss. 1985). In *Hughes*, this Court reversed the trial courts ruling and remanded the case back to the trial court, stating:

> At issue here is a question of fundamental fairness. Hughes was charged in an indictment with the sale of more than one ounce of marijuana. He was entitled to have his right to retain his liberty judged by reference to whether he be proven guilty beyond a reasonable doubt of that offense, and of that offense only. When proof of a wholly unrelated drug offense . . . w[as] placed before the jury, the chance that Hughes would be found guilty by reason of factors extraneous to the charge in the indictment was substantially increased in a legally impermissible way. We reverse and remand for a new trial. *See Gallion v. State,* 469 So.2d 1247, 1249 (Miss. 1985). . . .

Hughes, 470 So.2d at 1048-1049.

In other cases, this Court has upheld the denial of motions for a mistrial. For example, in *Mills*, this Court held that the denial of a Motion for Mistrial was appropriate where the trial court believed that the jury could not hear the statement that violated the trial courts ruling on a Motion in Limine. 763 So.2d at 929. Also, in *Gilley v. State*, this Court held that the trial court's denial of a motion for a mistrial was appropriate where the Prosecution's statement in violation of a court order was clearly contradicted by the evidence produced at trial. 748 So.2d 123, 127 (¶ 9) (Miss. 1999). In those cases, unlike the present case, the violation of the trial court's order was not very prejudicial to those defendants' cases.

In this case, however, the fact that the Prosecution's witness put before the jury that another case had been made against the Defendant caused the trial to become fundamentally unfair to the Defendant. The Defendant was effectively tried for the charge in the indictment on which the trial was based, along with other charges that were elicited by the Prosecution, in

II. THE TRIAL COURT ERRED BY RULING THAT THE DEFENDANT COULD NOT SUBMIT EVIDENCE IN SUPPORT OF HIS THEORY OF DEFENSE.

During the trial, the Prosecution objected to the Defendant calling his wife, Lorene Gully, as a witness at the trial. (R.E. 16; R. 3/199-200). The Prosecution based this objection on the Defendant's Reciprocal Discovery, which did not provide what Lorene Gully would testify regarding in this case. (R.E. 8; R. 1/23-24; Trial Ex. 13). In the Defendant's Reciprocal Discovery, Lorene Gully was listed as one of the witnesses which the Defendant wished to call at trial, and provided the following information: "Lorene Gully, wife, who was present at the house at the time of arrest and heard Lavon Bohanan state that anything in the house belonged to him." *Id.*

Also, in the Prosecution's Discovery, which was picked up by the Defendant's attorney on or before April 17, 2007, the Prosecution listed as evidence for the case a "JVC DIGITAL VIDEO CASSETTE TAPE" and "TWO CD'S." (R.E. 11; Trial Ex. 6). However, the Defendant's attorney only received one of the "CD's" which only included photographs at the time he picked up the Discovery for this case. Thus, it is clear that as of April 17, 2007, the Prosecution was aware of the existence of these videos, but somehow neglected to show the contents of the video to the Defendant's attorney until two (2) working days before the trial and neglected to provide a copy of the video to the Defendant's attorney until the day before the trial. (R.E. 16; R. 3/205).

The Reciprocal Discovery provided by the Defendant on August 10, 2007—more than three (3) months prior to the trial—clearly indicates that the Defendant believed that the trial would be on a separate case where the Defendant was actually arrested, and not the sale case involving the "buy/walk" operation. Further, the Defendant was justified in his belief that the other case would be the one tried because of the substantial errors in the indictment, which included an incorrect date for both the alleged offense and the Grand Jury Term. (R.E. 7; R. 1/2-

The Prosecuting Attorney based his objection to calling the Defendant's witnesses to the stand based on Rule 9.04 of the Mississippi Uniform Rules of Circuit and County Court Practice, which provides that:

> If during the course of the trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:
>
> 1. Grant the defense a reasonable opportunity to interview the newly discovered witness . . . ; and
>
> 2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
>
> 3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.
>
> The court shall follow the same procedure for violation of discovery by the defense.

Miss. R. Unif. Cir. and Cty. Ct. 9.04(I).

Section (C)(1) of Rule 9.04 of the Mississippi Uniform Rules of Circuit and County Court Practice also provides that if a defendant requests discovery from the Prosecution, the defendant must provide: "[n]ames and addresses of all witnesses in chief which the defendant may offer at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by such witness." This rule does not require that the Defendant inform the Prosecution of the exact testimony that will be given by each witness.

Also, "[b]oth the state and the defendant have a duty to timely supplement discovery." Miss. R. Unif. Cir. and Cty. Ct. 9.04(E). The Prosecution did not allow the Defendant's attorney to view the video of the alleged transaction until two (2) working days before the trial began, and

particularly in this case where the Prosecution was allowed to present two witnesses to identify the Defendant and where those witnesses' identification of the Defendant was very questionable. The Defendant was substantially prejudiced by not being allowed to present witnesses in support of his theory of defense, because by not allowing him to call Lorene Gully to testify, the Defendant was left with only his testimony to support his Theory of Defense. After not allowing the Defendant to present witnesses in support of his theory of defense, the trial court abused its discretion by failing to grant a mistrial in the interests of justice.

III. THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL DID NOT JUSTIFY THE GUILTY VERDICT.

The Motion for J.N.O.V., or in the Alternative, Motion for New Trial, filed by the Defendant, through his attorney was based on the following grounds: (1) the verdict was contrary to law; (2) the verdict was contrary to the evidence; (3) the verdict was strongly against the overwhelming weight of the evidence, and evinced bias and prejudice against the Defendant; (4) the Court erred in not granting a mistrial upon the Prosecution's witness testifying concerning another charge against the Defendant; [1] (5) the Court erred in failing to sustain the Motion for Directed Verdict at the close of the Prosecution's case in chief and at the conclusion of the trial; (6) the Court erred in failing to give a peremptory instruction to the jury requiring them to return a verdict of "not guilty;" and (7) the Defendant is entitled to a J.N.O.V. in this case because of the failure of the Prosecution to prove its case against the Defendant beyond a reasonable doubt. (R.E. 6; R. 1/86-88). Both of these Motions were overruled at the Sentencing Hearing, on January 8, 2008. (R.E. 6; R. 1/96, 4/335-336).

This Court stated, regarding the denial of a motion for J.N.O.V., that: "[w]hen considering a trial court's denial of a motion for judgment notwithstanding the verdict, the

[1] *See* discussion *supra* Part I.

standard of review is de novo." *Gilmer v. State*, 955 So.2d 829, 833 (¶ 5) (Miss. 2007) (citing *Poole v. Avara*, 908 So.2d 716, 726 (Miss. 2005)). This Court also "reviews whether the Court erred in denying a motion for directed verdict under a de novo standard of review." *Id.* (citing *White v. Stewman*, 932 So.2d 27, 32 (Miss. 2006)).

"A motion for a new trial . . . falls within a lower standard of review than does that for a judgment notwithstanding the verdict." *Taggart v. State*, 957 So.2d 981, 987 (¶ 11) (Miss. 2007) (citing *Sheffield v. State*, 749 So.2d 123, 127 (Miss. 1999). "A motion for a new trial simply challenges the weight of the evidence." *Id.* "This Court has explained that it will reverse the trial court's denial of a motion for a new trial only if, by doing so, the court abused its discretion." *Id.* (quoting *Gleeton v. State*, 716 So.2d 1083, 1088 (Miss. 1998)). "The standard of review for denial of peremptory instructions is the same" as the denial of a motion for new trial. *Jones v. State*, 904 So.2d 149, 154 (¶ 14) (Miss. 2005) (citing *Walker v. State*, 881 So.2d 820, 830 (Miss. 2004)).

In *Boone v. State*, 973 So.2d 237 (Miss. 2008), this Court discussed its review of a motion for directed verdict, a motion for J.N.O.V., and a motion for new trial, stating:

> A motion for a directed verdict and a motion for a judgment notwithstanding the verdict challenge the sufficiency of the evidence. *Bush v. State,* 895 So.2d 836, 843 (Miss. 2005). When reviewing a case for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Jackson v. Virginia,* 443 U.S. 307, 315 [] (1979)). The evidence must show "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* (quoting *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968)). If, keeping in mind the reasonable-doubt standard, "reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Id.* (quoting *Edwards v. State,* 469 So.2d 68, 70 (Miss. 1985)).
>
> A motion for a new trial, on the other hand, challenges the weight of the evidence. *Id.* at 844. We will disturb a jury verdict only when "it is so contrary

> to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.* (citing *Herring v. State,* 691 So.2d 948, 957 (Miss.1997)). This Court acts as a "thirteenth juror" and views the evidence in the light most favorable to the verdict. . . . *Id.* (citing *Herring,* 691 So.2d at 957).

Boone, 973 So.2d at 242 (¶ 18) (quoting *Brown v. State,* 970 So.2d 710, 712-713 (Miss. 2007)).

Regarding the legal sufficiency of the evidence in reviewing the denial of a motion for a directed verdict and a motion for J.N.O.V., this Court has stated:

> A motion for a directed verdict and a motion for a verdict notwithstanding the judgment "are predicated upon the idea that the evidence simply does not justify a verdict of guilty beyond a reasonable doubt." *Washington v. State*, 800 So.2d 1140, 1144 (Miss. 2001). As this Court has stated,
>
> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence—not just that supporting the case for the prosecution—in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb. *Mangum v. State*, 762 So.2d 337, 341 (Miss. 2000).

Ladnier v. State, 878 So.2d 926, 929-930 (¶ 11) (Miss. 2004).

Also, regarding the standard of review for the denial of a motion for new trial and for the denial of peremptory instructions, this Court has stated:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). The evidence should be weighed in the light most favorable to the verdict. *Id.* The standard of review for denial of peremptory instructions is the same. *Walker v. State*, 881 So.2d 820, 830 (Miss. 2004).

Jones, 904 So.2d at 154 (¶ 14).

This Court has also stated that, "[w]hen evaluating the denial of a motion for new trial, this Court will overturn the trial court only if it abused its discretion in that it denied a new trial though the verdict was against the overwhelming weight of the evidence." *Gilmer*, 955 So.2d at 833 (¶ 6) (citing *Poole*, 908 So.2d at 726). The Court also went on to state:

> The weight and the sufficiency of the evidence are not synonymous. [*Poole*, 908 So.2d at 726]. When determining whether the evidence was sufficient, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions. *Id.* When determining whether the verdict was against the overwhelming weight of the evidence, we will not order a new trial unless we are convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted. *Id.* at 727.

Gilmer, 955 So.2d at 833 (¶ 7).

Thus, this review can be broken up into two issues: (1) whether the evidence was legally sufficient to justify a guilty verdict; and (2) whether the evidence was of enough weight to justify a guilty verdict.

In this case, even when the evidence is viewed in a light most favorable to the Prosecution, a rational trier of fact should not have found that the Prosecution had proven the essential elements of the crime beyond a reasonable doubt. The statute the Defendant was accused of violating is Miss. Code Ann. § 41-29-139(a)(1), which provides that: "it is unlawful for any person knowingly and intentionally: [t]o sell . . . a controlled substance." The major issues concerning whether the evidence was legally sufficient to find the Defendant guilty beyond a reasonable doubt are the identification of the Defendant and whether the chain of custody was truly established.

Further, when the weight of the evidence is examined, it is also clear that the jury's verdict was "so contrary to the weight of the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." This is because along with the issues

that also deal with the sufficiency of the evidence, there are additional facts in this case that do not threaten the sufficiency of the evidence, but do threaten the weight of the evidence.

The first issue is the chain of custody of the evidence, which goes to both the sufficiency and the weight of the evidence. The chain of custody of the evidence consisting of the hydrocodone pills allegedly sold to the informant was established, but only as to after the evidence reached the EMDTF office during Boyd and McMahan's testimony. (R. 2/107-112, 3/193-194). Several issues concerning this evidence before it reached the EMDTF office were brought up at trial. The first issue is that Boyd only searched the informant's person on the date of the alleged transaction, and did not search the vehicle or house where the transaction was alleged to have occurred. (R. 2/133-134). This fact, taken alone, would probably not be terribly significant, based on other testimony regarding Boyd's supervision of the informant. However, this was not the only issue regarding the custody of the evidence.

During Boyd's testimony, Boyd stated that the hydrocodone pills were in a white "Mr. Discount" drugstore bag at the time of the alleged transaction. (R. 2/109). Also, Boyd was confused as to the number of pills that were involved in the alleged transaction, stating at one point that there were 200 pills, and then the Prosecuting attorney led him to say it was only 40 pills. (R. 2/111). However, the informant who allegedly purchased the hydrocodone, Informant Parker, testified that when he received the hydrocodone, it was wrapped in a piece of paper towel. (R. 3/166, 172). The Defendant's attorney even had a paper towel admitted into evidence, and Informant Parker identified it as being similar to the item in which hydrocodone he purchased was wrapped. (R. 3/172-173; Trial Ex. 12). Further, the name on the white bag is "Gordon Gloria," and the Defendant produced medical records showing that he was prescribed hydrocodone. (R.E. 9; Trial Ex. 2, 14). The Prosecution made no attempt to connect the Defendant to the person whose name was on the white bag. Thus, it is clear that between the

time the pills were allegedly purchased by Informant Parker and when they arrived at the EMDTF office, the packaging had changed but none of the witnesses explained or justified this change in the evidence.

This Court has held that "the test with respect to whether there has been a break in the chain of custody of evidence is whether there is an indication of probable tampering." *Blanton v. State*, 727 So.2d 748, 752 (¶ 14) (Miss. Ct. App. 1998) (citing *Nalls v. State*, 651 So.2d 1074, 1077 (Miss. 1995) (citing *Nix v. State*, 276 So.2d 652, 653 (Miss. 1973))). In *Blanton*, it was held that there was no evidence of tampering because the informant and his vehicle were searched prior to the transaction, and the crime laboratory received the evidence in the bag in which the officer had sealed it. *Blanton*, 727 So.2d 752-53 (¶ 14). However, in this case, the informant's vehicle, next to which the alleged transaction occurred, was not searched prior to the transaction, and there were conflicts in the informant and the agent's testimony regarding the packaging of the evidence when it was received by the informant and when it was booked into evidence by the agent. Because of this conflict in the testimony and inadequate search of the premises on which the alleged sale took place, there is a clear indication of tampering with the evidence.

The next issue is the Prosecution's violation of its Discovery requirements, which goes to both the sufficiency and weight of the evidence. Although the Defendant's attorney did not object to the white paper "Mr. Discount" bag being placed into evidence for identification only, or object when it was actually admitted into evidence, its admission into evidence was a "plain error" due to the failure of the Prosecution to comply with its Discovery requirements. (R. 2/112, 3/194). At the trial, when the item was shown to the Defendant's attorney prior to it being admitted into evidence, the name "Gordon Gloria" was not shown to the Defendant or his attorney and the fact that a name other than the Defendant's was on the bag was never disclosed

to the Defendant or his attorney. In fact, it was not until the photos of the evidence were delivered to the Defendant's attorney for purposes of preparing the appeal that this was even discoverable by the Defendant or his attorney.

Since the Defendant or his attorney were not informed about this feature of the evidence, it appeared from the Defendant's attorney's perspective that he had no grounds for an objection to the admission of this evidence, because the Prosecution seemed to have satisfied the requirements of Rule 901 of the Mississippi Rules of Evidence. Thus, this case differs from cases where a defendant's attorney failed to object to the chain of custody. *See Johnson v. State*, 904 So.2d 162, 170 (¶ 24) (Miss. 2005) (claim was procedurally barred because Defendant's attorney made no objection).

Rule 9.04(A) of the Mississippi Uniform Rules of Circuit and County Court Practice provides the rules for what the Prosecution is required to disclose, and states that:

> [T]he prosecution must disclose to each defendant or to defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order the following which is in the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecution: . . .
>
> 5. Any physical evidence and photographs relevant to the case or which may be offered in evidence; and
>
> 6. Any exculpatory material concerning the defendant.

Miss. Unif. R. Cir. and Cty. Ct. 9.04(A)(5), (6). *See also* Miss. R. Prof. Conduct 3.8(d) (Prosecutor's duty to disclose evidence or information which tends to negate the guilt of the accused).

While the Prosecution's failure to disclose this information was not likely willful, the Defendant's due process rights were nevertheless violated by the Prosecution's failure to disclose this potentially exculpatory evidence. Further, the Prosecution provided no information that

would show that the bag in which the pills were allegedly transferred had any name on it. (Trial Ex. 6). On the list of evidence, the only item listed regarding the bag or pills was simply listed as "hydrocodone." (R.E. 11; Trial Ex. 6). In fact, the only time this portion of the evidence was listed as being anything other than hydrocodone in the Discovery picked up by the Defendant's attorney, it was only listed as a "white paper bag." (Trial Ex. 6). Also, upon receipt of the Defendant's Reciprocal Discovery, which included medical records indicating that the Defendant had been prescribed hydrocodone, the Prosecution was aware or should have been aware that evidence linking the pills allegedly purchased by Informant Parker to another person could be exculpatory evidence in this case. (R.E. 8; Trial Ex. 13, 14).

This Court has provided the rules and a test for whether the Prosecution's failure to inform the Defendant or his attorney of exculpatory evidence in its possession, stating:

> [The Defendant] relies on the United States Supreme Court decision in *Brady v. Maryland* which held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady v. Maryland,* 373 U.S. 83, 87 [] (1963). Evidence is favorable to an accused when the 'evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'' *Simon v. State,* 857 So.2d 668, 699 (Miss. 2003) (quoting *Kyles v. Whitley,* 514 U.S. 419, 433 [] (1995) and *United States v. Bagley,* 473 U.S. 667, 682 [] (1985)). We have held
>
> To establish a *Brady* violation a defendant must prove the following: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*United States v.*] *Spagnoulo,* 960 F.2d 990, 994 (11th Cir. 1992), citing *United States v. Meros,* 866 F.2d 1304, 1308 (11th Cir. 1989), *cert. denied,* 493 U.S. 932 [] (1989).

Howard v. State, 945 So.2d 326, 337 (¶ 11) (Miss. 2006) (citing *King v. State,* 656 So.2d 1168, 1174 (Miss. 1995)). *See also Parisie v. State*, 848 So.2d 880, 884 (¶ 14) (Miss. Ct. App. 2002)

(Prosecution's suppression of evidence can violate due process when it was done knowingly or inadvertently).

In this case, it is clear that the Prosecution possessed the evidence favorable to the Defendant, the Defendant did not possess this information and could not obtain the information through reasonable diligence, and that this information was either knowingly or inadvertently suppressed by the Prosecution. Also, had this evidence been disclosed to the Defendant, there is a reasonable probability that the outcome of the proceedings would have been different.

This Court has dealt with this issue previously, in *Manning v. State*, where this Court held that a "shoe-print report" that indicated that the likely size of the shoe of the offender existed and was known to the prosecution, and that evidence of a shoe-print not matching the defendant's shoe size found at the scene of the crime presented a reasonable probability that the proceedings would have been different. 884 So.2d 717, 725 (¶ 23) (Miss. 2004). Due to the Prosecution's failure to provide this information to the defendant or his attorney, this Court found that the case should be remanded and for the trial court to proceed with that issue. *Id.* Since a report indicating that a shoe-print recovered does not match the Defendant's shoe size was held to create a reasonable probability that the proceedings would have been resolved differently, then it should also be the case that evidence indicating that the pills allegedly sold to the informant belonged to someone else, when the Defendant had a prescription for the same type of pills, would result in a reasonable probability that the proceedings would have been resolved in the Defendant's favor.

The next issue regarding the sufficiency and weight of the evidence is the identification of the Defendant. First of all, Informant Parker was a friend of the Defendant and a regular visitor to the Defendant's house, so there was no need to have him pick the Defendant out of a photo lineup. (R. 3/171). The fact that Boyd required Informant Parker to pick the Defendant

out of a photo lineup could only have been because Boyd was unsure of the identity of the seller in the alleged transaction. Also, Informant Parker was an informant because he was caught trying to obtain a prescription by fraud, and the EMDTF decided that instead of having Informant Parker indicted and tried on the offense, they would offer to have him act as an informant to "work off" the charge—despite the clear issues with his veracity, as made evident by the act he committed which led to his becoming an informant. (R. 2/123-124).

The photo lineup was merely an attempt to bolster potential testimony, because the informant who picked out the Defendant's photo was his friend and testified that did not need a photo lineup to identify the Defendant, and when the informant's credibility is examined, this identification holds no weight. (R. 3/173). Further, Boyd picked the Defendant out of a photo lineup while looking at the Defendant's driver's license picture. (R. 2/132). These identifications were useless as the only requisite for these identifications was the ability to recognize a friend's photo or the ability to match two identical photos. (R.E. 12; Trial Ex. 8-9). Since there was no need to have Informant Parker participate in a photo lineup to identify the friend of his whom he allegedly called and purchased pills from, Informant Parker's photo lineup was simply done to assure Boyd of his alleged eyewitness identification.

Because of Informant Parker's lack of any credibility or veracity, for the identification to be at all effective, it must have come from either Boyd's eyewitness account or from the video of the alleged transaction. In the video, the only thing clear about the alleged seller's identity is that he is a black male, and further, the video contained no audio by which to identify the Defendant's voice. (Trial Ex. 3, 4). Before the operation, Boyd testified that he had never seen the Defendant or a photo of the Defendant. (R. 2/94, 124). Boyd also testified that he was within arm's length of the video camera the entire time of the alleged transaction. (R. 2/91). Thus, Boyd's view would have been the same as the view of the video which could not clearly

identify the Defendant. Boyd also stated that there were blinds on the window that partially obstructed his view, but these blinds were clearly not present in the video. (R. 2/90-91; Trial Ex. 3, 4). Boyd also made an in-court identification of the Defendant, but that is not a difficult task when the Defendant is sitting at the defense table, just as it was not difficult to identify him in a photo lineup while viewing his driver's license photo. (R. 2/116).

Now, since the alleged eyewitness identifications are questionable at best, it would stand to reason that the agents would have collected some collaborating evidence to show that the Defendant was the person who sold the pills in the alleged transaction. However, this could not be farther from what they did. First, they allowed Informant Parker to call a person whom he claimed was the Defendant, without recording the call or verifying the number dialed by Informant Parker. (R. 2/120-121). Then, when the Defendant was alleged to have arrived at Informant Parker's house, Boyd testified that he arrived in a Red Ford Focus, however, neither Boyd nor the other agents working on this operation took down the license plate number. (Tr R. 2/93, 135). Also, if it was the case that the pills were in a white paper "Mr. Discount" drugstore bag, a fingerprint analysis of the bag would have been possible; however no fingerprint analysis was conducted. (R. 2/136). Further, Boyd testified that the informant was given "official buy funds" of the EMDTF to make the alleged purchase, and copies of the one hundred dollar bill and of five (5) twenty dollar bills were in the discovery. (R. 2/93; Trial Ex. 6). However, these bills were not recovered from the Defendant to tie him to the alleged sale. Thus, the only thing linking the Defendant to the alleged transaction is the testimony of an informant who lacks any credibility and an officer whose recollection and view of the alleged transaction are at best questionable.

In another case where the informant's identification of a defendant was questionable and discrepancies in the testimony of witnesses were present, this Court held:

> This discrepancy, coupled with the absence of the sort of evidence we customarily encounter in cases of this sort—the corroborating testimony of a professionally trained narcotics agent plus physical evidence in the form of marked [Mississippi Bureau of Narcotics] funds—can only yield a reasonable doubt of [the defendant]'s guilt. . . . For better or for worse, the law demands that no jury may convict unless the defendant be guilty beyond a reasonable doubt. (citations omitted) . . . The question before us is not whether the defendants are in fact guilty or are probably guilty, but whether the State has made out beyond a reasonable doubt a case sufficient to withstand the weight of testimony consistent with innocence. The doubt that reasonable men engaged in a search for truth could safety accept and act upon the evidence to a moral certainty of guilty must be resolved in favor of the defendant. *Ewing v. State,* 9 So.2d 879, 880 (Miss. 1942) (quoted in *Mitler v. State,* [] 22 So.2d 164, 166 ([Miss.] 1945)).
>
> The law demands that we reverse when we are confronted with a case where no reasonable juror could have found the defendant guilty beyond a reasonable doubt. *Murphy v. State,* 566 So.2d [1201,] 1205-06 [(Miss. 1990)]; *Carol v. State,* 540 So.2d 1330, 1333 (Miss. 1989).

Ashford v. State, 583 So.2d 1279, 1282 (Miss. 1991).

Further, although the vast majority of cases that this Court has decided involving the sufficiency of the evidence for sales of controlled substances have held that the evidence presented was sufficient, most or all of these cases have involved more sufficient evidence than the present case. For example, in *Johnson v. State*, this Court held that evidence was sufficient to justify the jury's verdict; however, in that case, the informant used had not been recently caught committing a crime involving patent dishonesty, and in fact, had only a juvenile offense on his record. 950 So.2d 178, 182-83 (Miss. 2007). In *Carter v. State*, the Mississippi Court of Appeals held that the evidence was sufficient where the video of the alleged transaction only captured part of the defendant's face, but the tape included audio by which the defendant's voice was identified. 869 So.2d 1083, 1088-89 (Miss. Ct. App. 2004). Another case held that minor discrepancies in witnesses' testimony did not harm the sufficiency of the evidence. *Mims v. State*, 856 So. 2d 518, 522-23 (Miss. Ct. App. 2003).

Based on these facts, there is no way that a rational trier of fact could have found that the essential elements of the alleged crime had been proven beyond a reasonable doubt. The identity of the person alleged to have sold the pills to Informant Parker was not proven beyond a reasonable doubt, and the chain of custody of the evidence was not proven beyond a reasonable doubt. Further, the other corroborating evidence that could have allowed the case to be proven beyond a reasonable doubt was not present. A verification of the phone number dialed by Informant Parker, a fingerprint analysis of the bag, a check of the license plate on the car alleged to have been driven to Informant Parker's house by the Defendant, and recovering to buy money from the Defendant would each have provided more credence to the Prosecution's case. However, none of these things were done, in spite of the fact that at least the first three things would have been very feasible and would not have changed the scope of the agents' plans for the operation.

Therefore, since the evidence was not legally sufficient to allow a rational trier of fact to find that the Prosecution proved its case beyond a reasonable doubt, the trial court erred when it denied the Defendant's Motion for a Directed Verdict at the close of the Prosecution's case in chief and when it denied the Defendant's Motion for J.N.O.V. at the Sentencing Hearing.

The other issues which arise in this case go to the weight of the evidence, and many of these issues deal with inconsistencies in the testimony of the Prosecution's witnesses. First, Boyd testified that the phone call, allegedly made to the Defendant, was made from Informant Parker's house; however, Informant Parker testified that the call was made from the EMDTF office and that they then went to his house to complete the transaction. (R. 2/86, 3/161). Also, Boyd testified that the window he and the video camera were looking out of had blinds that partially obstructed his view, but the video clearly showed that the window did not have blinds partially obstructing the view, even though it was not clear in showing the identity of the person

involved in the alleged transaction. (R. 2/90-91; Trial Ex. 3, 4). Further, Boyd testified that the informant's house was searched days before, but Informant Parker testified that it was searched on the date of the alleged transaction and that if Boyd said otherwise, he was lying. (R. 2/132-133, 3/163). However, Informant Parker did change this testimony after being led to do so by the Prosecution. (R. 3/186-187). Also, Boyd stated that the vehicle in front of which the alleged transaction occurred was a passenger car, but Informant Parker testified that it was a Jeep Cherokee, a truck-like sport utility vehicle. (R. 2/132, 3/162). Finally, Boyd testified that the person alleged to have sold drugs to the informant left and returned to his car to retrieve the pills, but Informant Parker testified twice that the person alleged to have sold the pills immediately engaged in the transaction upon arrival and never went back to a vehicle. (R. 2/95, 3/165, 184).

In *Fuller v. State*, the Mississippi Court of Appeals held that evidence was of enough weight to justify the conviction where the informant's person and car were searched prior to the transaction. 910 So.2d 674, 681-82 (Miss. Ct. App. 2005). However, in this case, the informant's vehicle where the alleged transaction occurred was not searched. Further, in *Wilks v. State*, the Court of Appeals held that where the act is not clear in video evidence, the corroborating evidence and the totality of the circumstances could provide enough weight to the evidence. 811 So.2d 440, 444-46 (Miss. Ct. App. 2001). However, in this case, the corroborating evidence was not anywhere near strong enough to reach the same conclusion. Also, in *Kelly v. State*, this Court held that an audio tape of the transaction could help to resolve inconsistencies in the testimony of witnesses in order to provide enough weight to the evidence. 910 So.2d 535, 539-541 (Miss. 2005). Although, in this case there was no audio tape to resolve the inconsistencies in Boyd's and Informant Parker's testimony.

These discrepancies in the testimony, when combined with the items which also deal with the sufficiency of the evidence clearly indicate that a guilty verdict was against the

overwhelming weight of the evidence. Jurors generally are charged with weighing the credibility of the witnesses to resolve conflicts in the testimony. *Jackson v. State*, 885 So.2d 723, 727-29 (¶ 18) (Miss. Ct. App. 2004) (citing *Hollins v. State*, 799 So.2d 118, 122 (¶ 10) (Miss. Ct. App. 2001)). However, in this case, it is clear that the jury's verdict evinced bias and prejudice against the Defendant. This was likely the result of the trial court's failure to grant a mistrial upon the Prosecution's eliciting testimony in violation of the trial court's ruling on the Defendant's Motion in Limine. Therefore, it is clear that the trial court abused its discretion by failing to grant the Defendant's request for peremptory instructions at trial and by denying the Defendant's Motion for a New Trial at the Sentencing Hearing.

IV. THE CUMULATIVE EFFECT OF THE ERRORS MADE BY THE TRIAL COURT REQUIRES THAT A NEW TRIAL BE ORDERED.

This Court has dealt with the situation where the trial of a case involved many errors, but where none of the errors, individually, would be enough to require a reversal, and has stated:

> Our case law has long allowed an accumulation of otherwise harmless error to result in reversal. *See Griffin v. State,* 557 So.2d 542, 552-53 (Miss. 1990). In *Jenkins v. State,* 607 So.2d 1171, 1183-84 (Miss. 1992) we stated that errors in the lower court which do not require reversal standing alone, may, taken cumulatively, require reversal. In *Byrom v. State,* 927 So.2d 709, 730 (Miss. 2006), in clarifying the scope of appellate review of cumulative error, we held that in 'cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.'

Flowers v. State, 947 So.2d 910, 940 (¶ 79) (Miss. 2007).

In this case, even if this Court were to hold that none of the previously discussed errors, in and of themselves, would require the Defendant's conviction to be reversed, then the cumulative effect of all of the errors does require that the Defendant's conviction be reversed. The most substantial errors made by the trial court should each be sufficient to vacate the jury's

verdict. The first major error occurred when the trial court denied the Defendant's Motion for Mistrial after the Prosecution violated the trial court's ruling on the Defendant's Motion in Limine.[2] The second occurred when the trial court also refused to allow the Defendant to present Lorene Gully in support of his theory of defense and denied the Defendant's Motion for Mistrial based on that ruling.[3] Other major errors made by the trial court deal with the denials of the Defendant's Motions for Directed Verdict, J.N.O.V., and New Trial, and the denial of peremptory instructions, which involve the sufficiency and weight of the evidence.[4]

There were also several less substantial errors made by the trial court. First, the trial court allowed the Prosecution to amend the indictment based on a motion filed four (4) working days before the trial and a motion filed on the date of the trial, and its denial of the Defendant's Motion to Dismiss the indictment due to its defects. (R.E. 4, 5, 14; R. 1/11-13, 48-51, 80-81, 2/6-9). Second, the trial court allowed into evidence a printout from "Google Earth," over the Defendant's objection, to establish the number of feet from a church in order to enhance the Defendant's possible sentence pursuant to Miss. Code Ann. § 41-29-142. (R. 2/117-119). Next, the trial court refused to allow the Defendant to present witnesses who would have testified regarding statements made by Informant Parker. (R.E. 16; R. 3/198-207). Finally, the trial court's rulings on several objections were erroneous. The standard of review for those types of rulings on the admissibility of evidence and testimony is "abuse of discretion." *Ellis v. State*, 934 So.2d 1000, 1004 (¶ 17) (Miss. 2006) (citations omitted).

The Prosecution filed two Motions to Amend Indictment. The first of these motions was to amend the date of the alleged crime from December 27, 2006 to September 27, 2006, and was filed on November 19, 2007—four (4) working days before the trial. (R.E. 5; R. 1/80-81). The

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[2] *See* discussion *supra* Part I.
[3] *See* discussion *supra* Part II.
[4] *See* discussion *supra* Part III.

second of these motions was to amend the header on the indictment to reflect that the indictment was returned in the January 2007 term of the Grand Jury, rather than the November 2006 term, and was filed on the day of the trial. (R.E. 5; R. 1/48-49). The Defendant, through counsel, filed his Motion to Dismiss which was based on the defective indictment on April 12, 2007. (R.E. 4; R. 1/11-13). On the day of the trial, the trial judge granted both of the Prosecution's motions, and denied the Motion to Dismiss. (R.E. 5, 14; R. 1/50-51, 2/6-9). Before ruling on these motions, the trial court asked the Defendant's counsel, "[i]s there some reason why you haven't had sufficient time to prepare for a trial on an incident alleged to have occurred on September of [20]06?" (R.E. 14; R. 2/7-8). However, the trial court failed to ask the Prosecution why it failed to file its Motions to Amend the indictment until the day of and week before the trial, when they were put on notice of the defects of the indictment more than five (5) months prior to the dates its motions were filed.

"[T]he trial court's decision to permit the district attorney to amend the indictment the day of the trial, is an issue of law and 'enjoys a relatively broad standard of review.'" *Jackson v. State*, 943 So.2d 746, 749 (¶ 11) (Miss. Ct. App. 2006) (citing *Peterson v. State*, 671 So.2d 647, 652 (Miss. 1996)). Even so, the granting of the Prosecution's Motions to Amend Indictment and denying the Defendant's Motion to Dismiss were errors by the trial court. The indictment should have been dismissed and re-submitted to a Grand Jury because of the substantial defects on its face.

The standard of review for the denial of a motion to dismiss an indictment is the "substantial evidence/manifest error" standard. *Short v. State*, 929 So.2d 420, 424 (¶ 11) (Miss. Ct. App. 2006) (citing *State v. Oliver*, 856 So.2d 328, 331 (¶ 5) (Miss. 2003)). "The court must deny a motion to dismiss 'only if the judge would be obliged to find for the [State] if the [State's] evidence were all the evidence offered in the case.'" *Oliver*, 856 So.2d 331 (¶ 5) (citing

Alexander v. Brown, 793 So.2d 601, 603 (Miss. 2001) (citing *Stewart v. Merchant's Nat'l Bank*, 700 So.2d 255, 259 (Miss. 1997))). "[T]he ultimate test, when considering the validity of an indictment on appeal, is whether the defendant was prejudiced in the preparation of his defense." *Medina v. State,* 688 So.2d 727, 730 (Miss. 1996). Therefore, the trial court should have dismissed the indictment against the Defendant because if the Prosecution's evidence were all that was offered, it would be impossible to prove that the alleged transaction occurred on December 27, 2006, as was stated in the indictment, when it was returned by the Grand Jury. (R.E. 7; R. 1/2-3).

Also, when Boyd, a witness of the Prosecution, testified that he had calculated the distance between the place of the alleged sale and the nearest church using "Google Earth," the Defendant objected due to improper foundation, but the printout from "Google Earth" was admitted into evidence over that objection. (R. 2/117-119). When asked on cross examination about how the distance was calculated, the witness stated that it was probably through the woods and that none of the agents drove to measure the distance or to see if the church was even open. (R. 2/142-143). However, when the address of the alleged transaction, which was 3104 52nd Street, Meridian, MS, and the address of the church alleged to be within 1,500 feet, which was the First Church of the Nazarene and having an address of 5121 29th Avenue, Meridian, Mississippi, are entered into "Google Maps" to get "Driving Directions," "Google Maps" estimates that the drive is 0.3 miles; and when the directions are described, the distances of the two paths are 0.2 miles and 486 feet. (R. 2/88, 116-118). Google Maps—Driving Directions, http://maps.google.com/maps?hl=en&tab=wl.

As there are 5,280 feet in a mile, 0.3 miles is equal to 1,584 feet, and 0.2 miles is equal to 1,056 feet and when the 486 feet are added to that number, it totals 1,542 feet. Thus, the distance between the church and the place of the alleged sale is greater than 1,500 feet when the

path between the two places is taken into account, rather than using a straight line through woods and other objects, and the trial court's admission of the "Google Earth" printout into evidence was a clear error.

The credits for Miss. Code Ann. § 41-29-142 state that the statute came into existence in 1989, and also state that it has not been amended since 1993. At the time this statute was last amended, there was no such thing as "Google Earth," and the only way to calculate distances in the manner calculated by "Google Earth" would have been to use a map and a ruler; however, Mississippi Appellate Courts have not sanctioned either of these methods. The methods that have been held sufficient to measure the distance for purposes of the enhanced penalties provided by Miss. Code Ann. § 41-29-142 have been where the distance was driven and measured with an odometer, where the distance was actually measured, and where the distance was both paced and driven. *See Johnson*, 904 So.2d at 167 (¶ 9) (distance was driven); *Chambers v. State*, 878 So.2d 153, 159-160 (¶ 29) (Miss. Ct. App. 2004) (distance was actually measured); *Jones v. State*, 791 So.2d 891, 893 (¶¶ 4, 14) (Miss. Ct. App. 2001) (distance was driven); *White v. State*, 761 So.2d 221, 227 (¶ 31) (Miss. Ct. App. 2000) (distance was actually measured); *Anderson v. State*, 749 So.2d 234, 237 (¶ 12) (Miss. Ct. App. 1999) (distance was paced and driven).

This Court has also held that, "basing a sentence enhancement on insufficient evidence affects an individual's fundamental rights." *Williams v. State*, 794 So.2d 181, 188 (¶ 28) (Miss. 2001). In *Williams*, the case was remanded for resentencing because there was insufficient proof of the 1,500 feet distance. *Id.* at 188 (¶ 29). Thus, based on when the statute was last amended and the treatment of the measurements by this Court and the Mississippi Court of Appeals, it is clear that the admission of the "Google Earth" printout for purposes of proving the distance for Miss. Code Ann. § 41-29-142 was an abuse of discretion on the part of the trial court.

The Prosecution also objected to all of the Defendant's proposed witnesses except for the Defendant himself, and the trial court ruled that the Defendant could not call any of the witnesses to which an objection was raised to testify. (R.E. 16; R. 3/198-207). One of these witnesses was the wife of the Defendant.[5] *Id.* The two other witnesses that the Defendant wished to call were Brenda Gale Fox and Suzanne Carolyn Cole, and they would have provided impeachment evidence against Informant Parker to corroborate the Defendant's testimony. (R.E. 17; R. 3/255-256). The Prosecution based its objection to these witnesses on Miss. R. Unif. Cir. and Cty. Ct. 9.04.[6] (R.E. 16; R. 3/198-207). However, these witnesses were listed in the Reciprocal Discovery provided by the Defendant, and further, the contents of their testimony regarding impeachment information against Informant Parker could not have been known by the Defendant or his attorney prior to Informant Parker's testimony. (R.E. 16, 17; R. 3/198-207, 255-256). The trial court's disallowance of the calling of these witnesses was therefore an abuse of its discretion.

Under Rule 601 of the Mississippi Rules of Evidence, since the persons not allowed to testify regarding were not the spouse of the Defendant, they were competent to testify. Further, both of those witnesses had the personal knowledge of the matters that they would have testified regarding as required by Rule 602 of the Mississippi Rules of Evidence. Also, the Defendant is allowed to attack the credibility of a Prosecution witness for impeachment purposes, and is allowed to do so through evidence relating to the witness' character for untruthfulness. Miss. R. Evid. 607, 608. Thus, not allowing these witnesses of the Defendant to testify was an abuse of discretion by the trial court.

Finally, there were several rulings on objections that were erroneous. First, the trial judge allowed the Prosecution to bolster the testimony of Informant Parker, who had yet to

[5] *See* discussion *supra* Part II.
[6] *See* discussion *supra* Part II.

testify, over an objection by the Defendant's attorney, by asking Boyd if he believed that Informant Parker was telling the truth when he said the Defendant was the one who sold him the pills. (R. 3/153-154). This bolstering is clearly not allowed by Rule 608(a)(2) of the Mississippi Rules of Evidence, which provides that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Thus, to allow the Prosecution to bolster the credibility of one of its witnesses before that witness had testified was an abuse of discretion by the trial court.

Next, when the Defendant's attorney attempted to ask the informant Informant Parker about three different things relating to his credibility, the Prosecution objected and the trial court sustained its objection each time; the three things asked about were the circumstances regarding Informant Parker's arrest, statements made prior to the trial by Informant Parker to the Defendant and in the presence of the other witnesses which were not allowed to testify, and the circumstances regarding Informant Parker being fired from his most recent job. (R. 3/176, 183, 186).

The Prosecution also objected to questions asked to the Defendant during his direct examination, and these objections were sustained; the questions asked of the Defendant dealt with the Defendant's family situation, recent operations for heart and hip problems of the Defendant, and statements made by Informant Parker prior to the trial. (R. 3/223, 226, 231). Further, during its objection to the question regarding the Defendant's operations, the Prosecution stated, in the presence of the jury, that "[h]e's just asking for sympathy from the jury." (R. 3/226). The trial court not only did not admonish the Prosecution's attorney for the comment, but went as far as to say that it was necessary to explain the objection. *Id.*

Rule 608(b) of the Mississippi Rules of Evidence provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking . . . his credibility . . .may . . . in the

discretion of the court, if probative of . . . untruthfulness, be inquired into on cross-examination of the witness concerning his character for . . . untruthfulness . . ." Further, "[t]he credibility of a witness may be attacked by any party . . ." Miss. R. Evid. 607. Also, "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Miss. R. Evid. 616. Based on these rules, the trial court abused its discretion when it refused to allow the Defendant to attack the credibility of a witness on cross examination of that witness and on direct examination of the Defendant.

While these errors on rulings on objections taken individually may not be enough to cause substantial prejudice, when they are combined with each other and the other errors that occurred at the trial, the cumulative effect is that the Defendant was deprived of a fair trial in this particular case, a new trial was clearly warranted, and the trial court abused its discretion by not granting the Defendant a new trial.

CONCLUSION

Based on the foregoing, the trial court abused its discretion by failing to grant both of the Defendant's Motions for a Mistrial. The "substantial and irreparable prejudice" from the Prosecution's violation of the trial court's ruling on the Motion in Limine caused a "miscarriage of justice" because the prejudicial effect of the violation could not be cured by a curative instruction after the damage had been done. Further, the Defendant was not allowed to present witnesses in support of his theory of defense, and by not allowing him to do so, the trial court caused a second "miscarriage of justice."

Further, based on the foregoing errors and the lack of sufficient evidence or evidence of enough weight, the trial court erred by failing to grant the Defendant's Motions for a Directed Verdict and for J.N.O.V., and abused its discretion by failing to give the jury a peremptory instruction and by failing to grant the Defendant's Motion for a New Trial. Also, the cumulative

effect of all of the errors in this case can warrant no other conclusion than that a new trial should have been ordered in this case.

Under Mississippi Law, "[a] criminal defendant is not entitled to a perfect trial, only a fair trial." *Powers v. State*, 945 So.2d 386, 397-98 (¶ 13) (Miss. 2006) (quoting *McGilberry v. State,* 741 So.2d 894, 924 (Miss. 1999) (citing *Sand v. State,* 467 So.2d 907, 911 (Miss. 1985)). This principle is derived from Article III, Section 26 of the Constitution of the State of Mississippi and the 6th Amendment of the United States Constitution.

What the Defendant in this case is seeking is a fair trial that is unbiased and unprejudiced by comments elicited by the prosecution in violation of a court order, where the Defendant is allowed to call witnesses in support of his theory of defense, where the Prosecution has disclosed all of the exculpatory evidence in its possession, and where the Prosecution is required to prove every element of the crime charged beyond a reasonable doubt. The Defendant did not receive a fair trial in this case, and in the interest of justice this Court should grant the Defendant's Motion for J.N.O.V. or his Motion for a Directed Verdict; or in the alternative, this Court should order that a new trial be held that conforms to the requirements of the laws of the State of Mississippi and the United States of America.

RESPECTFULLY SUBMITTED, this the 16th day of May, 2008.

J.D. GULLY, APPELLANT

BY: Charles W. Wright

CHARLES W. WRIGHT, JR.,
ATTORNEY FOR APPELLANT

CHARLES W. WRIGHT, JR.
CHARLES W. WRIGHT, JR., PLLC
POST OFFICE BOX 1677
1208 22ND AVENUE
MERIDIAN, MS 39302-1677
(601) 693-6555
MSB No.[redacted]

CERTIFICATE OF FILING

I, Charles W. Wright, Jr., do hereby certify that I have this day caused to be delivered, the original and three true and correct paper copies of the Brief of Appellant, to:

Betty Sephton, Clerk
Supreme Court of the State of Mississippi
Office of the Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Jackson, MS 39201

This the 16th day of May, 2008.

CHARLES W. WRIGHT, JR.,
ATTORNEY FOR APPELLANT

CHARLES W. WRIGHT, JR.
CHARLES W. WRIGHT, JR., PLLC
POST OFFICE BOX 1677
1208 22ND AVENUE
MERIDIAN, MS 39302-1677
(601) 693-6555
MSB No. [redacted]

CERTIFICATE OF SERVICE

I, Charles W. Wright, Jr., do hereby certify that I have this date mailed, postage prepaid, by United States mail a true and correct paper copies of the foregoing Brief of Appellant to the following:

Honorable Lester F. Williamson, Jr.
Lauderdale County Circuit Court Judge
P.O. Box 86
Meridian, MS 39302-0086

Honorable E.J. "Bilbo" Mitchell
District Attorney
Post Office Box 5172
Meridian, MS 39302-5172

Honorable James M. "Jim" Hood, III
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

SO CERTIFIED, this the 16th day of May, 2008.

CHARLES W. WRIGHT, JR.,
ATTORNEY FOR APPELLANT

CHARLES W. WRIGHT, JR.
CHARLES W. WRIGHT, JR., PLLC
POST OFFICE BOX 1677
1208 22ND AVENUE
MERIDIAN, MS 39302-1677
(601) 693-6555
MSB No. [redacted]